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No. 07-1190

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IN THE

Supreme Court of the United States

WALTER BROWNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The government's response attempts to deny a conflict among the Circuits that is expressly recognized in the Eleventh Circuit's opinion, to obfuscate a second acknowledged conflict by concocting a waiver argument, and to mask the third conflict by conflating two doctrines into a non-existent rule. In the end, the government cannot obscure that which the Eleventh Circuit itself recognized – that the decision expressly, and admittedly, creates disharmony among the Circuits. And, contrary to the government's repeated fallback argument that, with respect to *all* of the conflicts, review is not warranted "at this time" or in this case (Brief for the United States in Opposition (BIO) at 15, 21, 26), Browne submits that the issues are plainly fit for this Court's review and that the undeniable hardship of being denied the new trial to which he assuredly would be entitled if the Court adopts the conflicting principles as correct fully warrants review. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

1. The government all but concedes that – as the Eleventh Circuit readily acknowledged – the court's interpretation of 29 U.S.C. § 186(a)(2) directly conflicts with the Second Circuit's interpretation of the same statute in *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). BIO 15. The government's attempt to paper over a conflict that the Eleventh Circuit readily embraced in rejecting *Cody* (App. 24-26), because "there is no reason to believe that the Second Circuit would have reached a different conclusion than the court below did on the facts of this case" (BIO 15) is, at best, unpersuasive.

The government accurately depicts the *Cody* holding. BIO 14. But it then ignores the Eleventh Circuit's unqualified rejection of *Cody*'s interpretation of Section 186(a)(2): "We see nothing in the statute or its legislative

history to support *Cody*'s seeming assertion that the existing employment relationship must be between the employer and current union members." (App. 26). And that acknowledged conflict cannot be evaded on the notion that Browne's conviction would have been upheld by the Second Circuit.

As the government concedes (BIO 14), *Cody* held that Section 186(a)(2) "was designed to protect the possible future unionization of present employees, not, as here, the possible future hiring of present union members." 722 F.2d at 1058-59. Section 186 requires an "*existing* employment relationship, between the employer and members of the union, not the possibility of a future relationship." *Id.* at 1058 (original emphasis). Here, there was undisputedly no such relationship: even under the government's portrayal of the evidence, the discussions between MEBA and Hvide involved a potential "future relationship" between the employer and the union.[1]

Finally, the government's blithe assertion that "the payment [to Browne] threatened 'the possible future unionization of [Hvide's] present employees'" (BIO 15), such that *Cody* can be read in harmony with the Eleventh Circuit's decision, is both unsupported by the record and incompatible with *Cody*'s actual holding. First, the undisputed evidence is that Hvide, consistent with its business practices, openly hired Browne as a lobbyist and consultant (and reported his compensation to the IRS), and that Browne openly registered with Broward County as a Hvide lobbyist. (R:442:21-22; R:430:112-27; R:438:175-76;

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[1] Moreover, the undisputed evidence establishes that Hvide *would not have employed* the MEBA members who might serve as engineers or officers on the as-yet unbuilt tankers, *i.e.*, a new operating company (of which Hvide would only be a 50% owner) would be created to operate the ships (R:431:81-82), such that Hvide would not itself have a relationship with MEBA.

R:444:62; Ex.83-84; Ex.308; Ex.417).[2] There was no evidence that Hvide's payments to Browne were intended to prevent future unionization of its employees, any more than there was such evidence in *Cody*. As the Second Circuit held, in language that assuredly would have been used to reverse Browne's conviction, the connection between the employer and the union official "was too nebulous at the time the gift was made to be the basis for a criminal charge," even if "it could be surmised that [the employer] hoped to obtain future good will" from the union official. *Id.* at 1059.

Because, as construed by the Second Circuit, Section 186 only criminalizes payments to a union official when future hiring is more than hypothetical, *i.e.*, when there is a potential collective bargaining relationship in the offing, *id.*, at 1059 ("it is this type of corruption that the framers of Section 186 sought to deter" rather than "where the plans were unformed and the friendly relationship was not then fairly susceptible to a more disparaging interpretation"), the government cannot escape the acknowledged conflict between the Eleventh Circuit's decision and *Cody*.

2. The same is true with respect to the Eleventh Circuit's rejection of the Second Circuit's decisions in *United States v. Biaggi*, 909 F.2d 662, 692-93 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), and *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995). (App. 41, 50-53). Seeking to avoid the acknowledged conflict of decisions, the government somewhat tepidly asserts that *Biaggi* is inconsistent with this Court's subsequent decision in *Griffin v. United States*, 502 U.S. 46 (1991), and that, although *Delano* post-dates *Griffin* by some four years, the Second Circuit "drew [its] approach" in *Delano* from *Biaggi*, without reference to *Griffin*, purportedly because "neither party cited

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[2] Browne and other lobbyists assisted Hvide in seeking an extension of a tugboat contract with the local port authority. (R:440:29-34).

Griffin in its briefing or suggested that the case might call *Biaggi* into question." BIO 21-22.[3] A more likely explanation is that *Griffin* and the Second Circuit's decisions address wholly different legal questions.

As Browne has noted, *Griffin*'s rationale has been invoked in RICO cases when the question is whether a RICO conviction can be upheld *against a sufficiency-of-the-evidence* challenge when all but two predicate acts have been rejected. Petition for Writ of Certiorari (Petition) at 20 n.13. If anything, the Eleventh Circuit's invocation of *Griffin* as a basis for rejecting the Second Circuit's measured approach – under which each trial should be reviewed to determine whether an appellate court's striking of critical RICO predicate acts warrants *a new trial* because the jury might well have been prejudiced by considering the invalidated predicate acts – yet further shows the propriety of granting review here. And that critical distinction also undoes the government's "waiver" argument. BIO 17-18.

As in *Delano*, Browne argued to the Eleventh Circuit that the invalidation of all but two predicate acts – here, because the Eleventh Circuit assumed that to be so (App. 30, 37, 53) – required a new trial on the RICO charges because the Taft-Hartley predicate acts were the centerpiece of the government's case. Brief of Appellant Browne at 39-44, *United States v. Browne*, No. 05-11137-G (11th Cir. June 22, 2005); Browne's Reply Brief at 20-22, *United States v. Browne*, No. 05-11137-G (11th Cir. Nov. 14, 2005). The government has yet directly to address that contention, and its attempt to transform Browne's reliance on the Second Circuit's cases into a waived "sufficiency" challenge cannot

[3] Here too, the government never invoked *Griffin* in the Eleventh Circuit to suggest that *Biaggi* or *Delano* had been wrongly decided. Brief for the United States at 52-53, *United States v. Browne*, No. 05-11137-G (11th Cir. Oct. 7, 2005). *Griffin* first appears in the Eleventh Circuit's decision on appeal.

disguise the Eleventh Circuit's expressly stated refusal to follow *Biaggi* and *Delano*.

Without the presumptively invalid Taft-Hartley predicate acts – including the Section 186 charge, which should have been invalidated under *Cody* – the government was left with two predicate acts arising from allegedly improper use of union vouchers upon which to sustain the RICO (and theft of honest services) convictions. The government's closing argument to the jury belies any contention that the Taft-Hartley predicate acts were anything other than the critical focus of the RICO charges:

> Walter Browne accomplished his goals by using the influence and assets and the prestige of the union, prestige that he had as the president of the union, to unlawfully accept payments from employers ....
>
> ... There is an inherent conflict between labor and management.... But from the conflict comes a negotiated compromise, and that negotiated compromise only works when the playing field is level.
>
> And the playing field cannot be level when the union officials are lining their pockets with money.
>
> And when an union official takes money from an employer or asks for money from an employer, not only is it a direct conflict of interest but it is a violation of their fiduciary duties.
>
> * * * *
>
> ... If you are an employer and you pay Walter Browne, you're not going to get organized....

> If you are a friend of Walter Browne, if you line his pocket, he will do what management wants.
>
> He is not going to act in the interest of labor....

(R:452:13-14, 49).[4] The government cannot evade the acknowledged conflict with *Biaggi* and *Delano*. As in those cases, the elimination of critical predicate acts should result in a new trial.

3. The government misapprehends the third conflict in the Eleventh Circuit's decision. Browne does *not* argue that the Eleventh Circuit "should not have reviewed for harmless error the district court's refusal to instruct the jury that '[s]upervisory personnel are not employees.'" BIO 23. Rather, the petition simply asserts that the Eleventh Circuit's use of the *Neder v. United States*, 527 U.S. 1 (1999) harmless-error standard (App. 63) both misapplies *Neder* and conflicts with precedent that, as the government acknowledges, holds it reversible error to deny a theory-of-defense instruction that is supported by the evidence. Petition at 26-27; BIO 25.

The government's core response serves, if anything, to sharpen the need for review of the Eleventh Circuit's decision. The government argues that the Eleventh Circuit "did not hold that a refusal to give a correct and adequately supported *theory-of-defense* instruction was not reversible error," but that "a refusal to instruct on an *element of an offense* does not automatically constitute reversible error." BIO 25 (original emphasis). Browne *never* argued to the Eleventh Circuit that the district court's refusal to charge the

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[4] The government's contrary analysis inappropriately takes into account two predicate acts that the Eleventh Circuit declined to address – because it disagrees with the Second Circuit's decisions. (App. 39-42).

jury on his theory of defense to the Taft-Hartley charges "automatically consitute[d] reversible error," but rather that, because the instruction was legally correct – a proposition that the government has not questioned on appeal or before this Court – and supported by the evidence, which is also unquestioned, the district court's ruling constituted reversible error. Brief of Appellant, *supra* 4, at 36; Reply Brief *supra* 4, at 7-8. The government's response is directed to a straw man.

The conflict arises because the Eleventh Circuit, misapplying *Neder*, held that the refusal to give an instruction that capsulizes Browne's key defense to the Taft-Hartley charges was harmless error because there was evidence at trial to contradict that defense. The court refused to review the record for evidence to support the incorrectly denied instruction, as the uniform case law requires. This is *not* to say that the refusal to give a requested theory-of-defense instruction can *never* be harmless error – a position that Browne has never advocated – but rather that the Eleventh Circuit applied the incorrect standard to determine whether reversible error follows from the erroneous denial of the requested instruction.[5]

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[5] The government's citation to *United States v. Kayser*, 488 F.3d 1070 (9th Cir. 2007), actually places the issue in proper context. BIO 26 n.7. In *Kayser*, the court reversed because the evidence supported the defendant's legally correct theory-of-defense instruction, 488 F.3d at 1076-77, applying precisely the standard from which the Eleventh Circuit inexplicably departed. In the cited footnote, the court noted that the defendant had argued for *per se* reversal for "any instructional error," and, declined to apply its pre-*Neder* precedent, held that "the district court's failure to give Kayser's proposed instruction prevented him from making a significant challenge" to an element of the tax-evasion charge "and thus cannot be harmless beyond a reasonable doubt." *Id.* at 1077 n.7. That is precisely the standard that the Eleventh Circuit *should* have

(continued . . .)

The distinction that evades the government is made clear by the Second Circuit's application of *Neder* in *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006), in which the court reversed securities-fraud convictions because the district court erroneously refused to instruct on the defendant's element-based defense:

> Quattrone's theory of the case relied on several innocent explanations for his conduct and each has some basis in the record. Among these, Quattrone testified that he had no wrongful intent and that he was not aware that the investigations were focusing on IPO-allocation issues germane to Tech Group activity. While the government did offer proof that Quattrone knew that the grand jury and the SEC sought Tech IPO-allocation related documents, we cannot say that the proof convinces us beyond a reasonable doubt that the error was harmless. *See Neder*, 527 U.S. at 17. That conclusion finds strong support in the deficiency of the court's charge. Under the charge, the jury was allowed to convict Quattrone of obstruction regardless of whether he intended such. Quattrone's defense of lack of knowledge ... was eliminated from the jury's consideration. Accordingly, the judgment of conviction ... must be vacated and the case remanded for retrial.

Id. at 179-80 (record citations omitted).

(... continued)

applied, and *not* the *Neder* standard for review of a refusal to instruct on *unchallenged* elements of a charged crime. Petition at 21-22.

So too, here, the district court's refusal to charge the jury that supervisors are exempt from the pertinent Taft-Hartley prohibitions wholly deprived Browne of any opportunity to have the jury consider that defense. When the erroneous instruction is analyzed under the *correct* harmless-error standard, it cannot be deemed other than reversible error.

Respectfully submitted.

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